

FEDERAL COURT OF AUSTRALIA

JUDICIAL REVIEW – error of law – natural justice

MIGRATION LAW – Extended Eligibility Temporary Entry Permit on basis of marriage – where spouse diagnosed with psychotic illness and was a psychiatric patient in hospital – whether there was a genuine and continuing relationship – relevance of applicant's commitment to marriage – relevance of benefit derived from spouse of contact with applicant.

Migration Act 1958 (Cth) s 34

Migration Regulation 126

Administrative Decisions (Judicial Review) Act 1997 (Cth)

Minister for Immigration, Local Government and Ethnic Affairs v Dhillon (Full Court, Federal Court, 8 May 1990, unreported) *Appl*

Jones v Minister for Immigration and Ethnic Affairs (1995) 37 ALD 454 *Appl*

Jones v Minister for Immigration and Ethnic Affairs (1995) 63 FCR 32 *Appl*

Singh v The Minister for Immigration and Ethnic Affairs, (Branson J, 29 April 1996, unreported) *Appl*

Ertan Ozbunbar v Minister for Immigration and Multicultural Affairs
QG 11 of 1997

Kiefel J
Brisbane

28 August 1998

**IN THE FEDERAL COURT OF AUSTRALIA
QUEENSLAND DISTRICT REGISTRY**

QG 11 of 1997

**BETWEEN: ERTAN OZBUNBAR
 APPLICANT**

**AND: MINISTER FOR IMMIGRATION AND MULTICULTURAL
 AFFAIRS
 RESPONDENT**

JUDGE: KIEFEL J

DATE OF ORDER: 28 AUGUST 1998

WHERE MADE: BRISBANE

THE COURT ORDERS THAT:

1. The time for the bringing of the application under the *Administrative Decisions (Judicial Review) Act* 1997 be extended to 22 January 1997 and leave be granted to amend the application in terms of the document filed on 3 June 1998.
2. The decision of the respondent made on 14 April 1992 be set aside and the matter be remitted to the respondent for determination according to law.
3. The respondent pay the applicant's costs of the proceedings including reserved costs.

Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules.

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JUDGE: KIEFEL J

DATE: 28 AUGUST 1998

PLACE: BRISBANE

REASONS FOR JUDGMENT

The applicant seeks review of the decision of the delegate made on 14 April 1992 which refused the grant of an Extended Eligibility Temporary Entry Permit to him.

Background Facts

The applicant arrived in Australia on 20 October 1982 on a temporary entry permit for three months. He did not leave the country on its expiry. In July 1984 he was located in Sydney and required to attend for an interview. He did not comply with directions as to reporting and a deportation order was made on 16 August 1984. The applicant moved to Victoria and in early 1987 met Oznur Ayana whom he married in a religious ceremony in early April 1987 and in a civil ceremony on 10 June 1987. Mrs Ozbunbar was an Australian resident.

On 27 September 1987 Mrs Ozbunbar was taken into custody, after having attempted to stab Mr Ozbunbar and her son from her first marriage. She was subsequently diagnosed as suffering from a psychotic illness and in March 1988 was transferred from a women's prison to Cumberland Hospital as a psychiatric patient.

In November 1987 a submission was received from a firm of solicitors acting on behalf of the applicant arguing that the deportation order should not be carried out. At this time no formal

application to regularise his status was made. In April 1988 the applicant made an application for resident status on the basis of his marriage to a permanent resident and on compassionate grounds, but did not lodge the required fee. His application, which had been dated November 1987, was relodged in July 1988 again, however, without the required fee.

In June 1988 Mrs Ozbunbar's treating psychiatrist put a series of questions to her, at the respondent's request. She answered that she would be really distressed if the applicant were deported and her son would miss him. The letter from the doctor which accompanied the answers said that Mrs Ozbunbar had, on a number of occasions, expressed a desire to resume cohabitation with the applicant.

The applicant was interviewed on 4 August 1988. He gave a history of his marriage and family circumstances and described his current level of contact with his wife. He said that he did not visit her very often because of lack of money, but that he telephoned her often. On 7 December 1989 the applicant attended a further interview, accompanied by a social worker from the Cumberland Hospital, Mr Rendalls. The applicant again described his relationship with his wife, and his level of contact with her, and claimed to provide her with emotional support. Mr Rendalls supported the assertion that the applicant provided such support. The applicant was then advised that his application was not considered to be active because no fee had been paid. A further application for permanent resident status, accompanied by an application for a permanent entry permit after entry, was lodged by the applicant in February 1990. The former application was based on his marriage. The entry permit application form was not appropriate and a further application for an Extended Eligibility Temporary Entry Permit was completed by the applicant in May 1990 and contained a statement of support in the name of Mrs Ozbunbar, although it appears to bear only her printed name. This does not assume importance. It is that further application which was the subject of decision.

In December 1991 the officer who ultimately made the decision in question wrote to Mr Ozbunbar and asked him to contact him. At about the same time he contacted the Cumberland Hospital and made enquiries of the senior social worker as to Mrs Ozbunbar's current condition, the possibility of her release, the frequency of Mr Ozbunbar's visits to her and the extent to which the visits might be regarded as beneficial to her welfare and recovery. The advice received from Mr Freele, the social worker in question, was in these terms:

“ ...
Mrs Ozbunbar remains a patient at this hospital. I have perused her file and spoken to the staff in reference to visits made by her husband. It appears that he visited her on two occasions in 1991 and made several phone calls to her. In October 1991, Onzno visited him at his address with a nurse in attendance. It is my opinion that Mr Ozbunbar's infrequent visits do not have any positive bearing on her welfare or recovery. It seems that he now no longer wishes contact with Onzno.

The plan for her release is for her to live in a hospital-run halfway house and the timing for the release is dependent upon the Minister for Health's approval.

... ”

On 15 January 1992 Mr Ozbunbar was interviewed by the decision-maker. His notes of what Mr Ozbunbar answered were accepted by Mr Ozbunbar as accurate. Mr Ozbunbar, in cross examination, did not however accept that the purpose of the interview, which had regard to the questions posed by the regulations were spelled out to him at its commencement. The notes taken were in these terms:

[Applicant] was interviewed at this office today with the assistance of a TIS interpreter. At the [interview] he made the following statements:

- *He last saw his wife 1½/2 months ago. She came to his workplace in Bondi accompanied by a nurse. They talked for about 20 minutes. More often he goes to the hospital.*
- *They also keep in touch by phone. He last spoke with her at 9.00 am this morning for 5/10 minutes and told her he was coming to immigration and might come to see her later in the day. This week they've spoken 4 times and 4 times last week. She calls him at work (he has no phone at his current residence) and he calls her at the cottages. Often call in turns.*
- *She is no different from 1½ years ago, still mentally retarded and they can only talk about simple things. She couldn't understand about his immigration situation.*
- *He has attended 10 medical tribunals with her except for the last because of changing residence and being out of touch with hospitals. He does not think the doctors are sympathetic about him reuniting with her. He planned to have her live with him at Manly but the doctors refused.*
- *He currently has a casual job "on call" at a Take-away in Bondi. He usually works at least for a few hours each day. His income is limited (he did not respond directly to a question on his income) and he has financial difficulties. He was evicted from his flat in Manly and had to sell his TV set.*
- *He does not support his wife financially but likes to buy her gifts and take her out for meals if he visits. He has bought her flowers, dress and slippers.*
- *He hasn't visited her for some time because of his financial situation and it is difficult because of his job.*
- *He would like to live with her if the doctors think she is well enough. She likes to talk to him and has no other people to talk to or visit her. The doctors have*

commented they communicate easily and well together. He offers her emotional support.

I requested a Stat Dec from [applicant] concerning the contact he has with his wife."

In April 1992 a further enquiry was made of Mrs Ozbunbar's treating psychiatrist, Dr Westerick, who provided the following information, noted by the decision-maker:

- *the 'original plan' was for [applicant] and his spouse to be reunited and live together however this did not eventuate.*
- *[Applicant's] spouse currently resides in a group of units built for female schizophrenics at Carlingford. She may remain there indefinitely.*
- *He sees Mrs [Ozbunbar] every few weeks. She does not refer to [applicant] and has given no indication of wishing to live with him. He last saw [applicant] 18 months ago.*
- *He sees no basis for the relationship.*

Statutory Provisions

At the time of the decision to refuse, s 34 *Migration Act* 1958 relevantly provided:

(3) *Where it appears to the Minister that the applicant is, under the regulations, entitled to be granted an entry permit of the class concerned, the Minister shall, subject to this Division, grant the applicant such an entry permit.*

(4) *Where it appears to the Minister that the applicant is not, under the regulations, entitled to be granted an entry permit of the class concerned, the Minister shall refuse to grant such an entry permit."*

Regulation 126 required the following to be satisfied:

"(1) ... at the time when the application is decided:

(a) the applicant is the spouse of an Australian citizen or an Australian permanent resident and was the spouse of that citizen or resident at the time when the application was lodged; and

(b) the applicant's relationship with that spouse is a genuine and continuing one; and

(c) the applicant meets the prescribed health criteria specified in Item 9 Schedule 1 and the public interest criteria; and

(d) the applicant is not an illegal entrant within the meaning of this regulation."

The only issue which arises under regulation 126 is that with respect to Mr Ozbunbar's relationship with his wife. It is not disputed that the grounds of review stated may be considered in connexion with this decision. The respondent does not oppose the application to extend time for the filing of the application.

The Decision under Review

The decision-maker concluded that Mr Ozbunbar failed to meet the legal and policy requirements for the grant of the Extended Eligibility Temporary Entry Permit under regulation 126 and rejected the application. The following were given as reasons:

"9. In relation to the prescribed criteria specified in Regulation 126(1), I have considered the following:

Mr Ozbunbar has stated at interview (f.180-181 refers) that he has had infrequent contact with his wife since she has been under medical supervision and this is confirmed by the hospital social worker (f.176 refers) and his wife's psychiatrist (f.188 refers).

I have considered Mr Ozbunbar's economic circumstances and while I accept that they do not permit him to provide substantial financial and economic support for his wife and hence give this aspect of their relationship little weight in reaching my decision.

In the absence of medical evidence to suggest that Mr Ozbunbar's infrequent contact with his wife has a positive bearing on her welfare or recovery I conclude that the emotional support to be expected in a genuine relationship is minimal.

There is no evidence that the present situation is not temporary and medical arrangements for the welfare of his wife are such that the relationship is not a factor. I am therefore not satisfied that the relationship is genuine and continuing and (1)(b) is not met.

As (1)(b) is not met it is not necessary to consider the remaining criteria of this regulation."

The Grounds of Review

What emerged as the principal ground for review of the decision was the alleged failure to take into account relevant considerations. In particular it was submitted that consideration was not had of the factors in the present case necessary to answer the enquiry with which regulation 126(1)(b) is concerned, whether Mr Ozbunbar's relationship with his spouse is a

genuine and continuing one.

Regulation 126 is concerned with whether there is a genuine marriage relationship. A reference to the reasons why a person married will not be determinative of that question. It has been said that where persons marry for perceived advantages, such as qualification for migration entry, that would not exclude the possibility that the marriage is, nevertheless, genuine: *Minister for Immigration, Local Government and Ethnic Affairs v Dhillon* (Full Court, Federal Court, 8 May 1990, unreported). It is not necessary in this case to address that aspect of the question. The focus of this application is upon how the relationship is tested. It was held in *Dhillon's* case that the test of such a relationship is whether, at the time the matter has to be decided, it can be said that the parties have a mutual commitment to a shared life as husband and wife, to the exclusion of others. That has been applied in connexion with regulation 126: *Jones v Minister for Immigration and Ethnic Affairs* (1995) 37 ALD 454, 457 (Hill J); (1995) 63 FCR 32, 45, 49 (Full Court). The central enquiry will usually be as to the parties' commitment and, as Branson J pointed out in *Singh v The Minister for Immigration and Ethnic Affairs* (29 April 1996, unreported) whilst there may be some objective facts relevant to, or consistent with, mutual commitment, often times it will require consideration of the parties' stated intentions. The true position will only be known to them. In these circumstances credibility will often assume importance. Reference to decided cases bears this out.

This case involves features not present in the cases to which I have had reference, although they are not unknown in the field of human relationships. Even where spouses or partners are unable to live together, one may nevertheless be able to discern what support is offered by one to the other, in particular, by their communications. It sometimes happens however that one party to a long standing relationship, by reason of some infirmity, becomes unable to participate to any extent in the relationship. An example would be where a spouse or partner who suffers from an acute form of dementia is institutionalised. Putting aside whatever financial contributions may be made to their maintenance, the only ostensible support that their partner may be able to provide will be by way of visits, attempts to communicate and the offer of affection. Society would not however regard a relationship as having ended because one party is no longer able to participate in it or, as is more relevant here, because it came to be discerned whether they derive any further benefit from it.

I do not intend to suggest that the relationship here in question is necessarily in the category of relationship such as that I have just described. That is for the relevant officer to determine. I am concerned with what questions are posed by the regulation, which must be addressed by that decision-maker. The focus must necessarily be upon Mr Ozbunbar's continued commitment to his wife. The enquiry would also permit, if not require, consideration of the relationship between them prior to Mrs Ozbunbar becoming institutionalised, at least where that is possible. The reasons given for refusal of the permit in this case do not, in my view, deal with the question of Mr Ozbunbar's commitment to his wife. If a view as to that matter did give rise to the decision, it has not found expression in the reasons.

The reasoning commences with a finding that contact between Mr Ozbunbar and his wife was infrequent. That is disputed by Mr Ozbunbar on the ground that it can refer only to physical contact by visits and could not take account of his telephone calls to his wife. The correctness of the finding is not however presently relevant. From that point however the decision-maker appears to have been concerned with what benefits that contact, and indeed any relationship between Mr and Mrs Ozbunbar, may be said to have for Mrs Ozbunbar. A conclusion of emotional support was not, in his view, open because the contact had no apparent effect upon her. From that point he reasoned that her situation was not likely to change or there was, in effect, no real place for the relationship in it.

In my view error of law is disclosed, for the reason that the decision-maker has not considered Mr Ozbunbar's commitment in the context of what may be discerned of the prior relationship. The error may be characterised as one as to the meaning and requirements of the regulation, or its corollary, that there has been a failure to take into account the considerations required by the regulation.

It was further submitted that the decision-maker took account of an irrelevant consideration, that identified above, that Mr Ozbunbar had infrequent contact with his wife. It may, as I have observed, amount to a mistake or error in finding upon facts, but this would not convert it to a consideration which is not relevant to the regulation's enquiry.

Mr Ozbunbar also relied upon the failure of the decision-maker to advise him of the contents of the communications from Mr Freele of 7 January 1992 and with Dr Westerick on 14 April 1992. By reason of my earlier conclusions it is not strictly necessary to deal with this

additional ground of breach of procedural fairness. I shall however, do so briefly.

Having regard to the history of the matter it could not, in my view, be said that Mr Ozbunbar did not appreciate that the decision-maker would be assessing the part he played in the continuation of any relationship he had with his wife. Much of what is contained in the communications is no more than a history of Mr Ozbunbar's attendances upon his wife and plans for her accommodation from time to time. The only aspects of the communications which might be regarded as both unknown and prejudicial to Mr Ozbunbar were the views expressed by Mr Freele as to whether Mr Ozbunbar wished continued contact with his wife, and those of Dr Westerick, as to whether there was a basis for the relationship. It is not relevant to consider whether those opinions were well based. It is sufficient to observe that they were addressed to a topic to which Mr Ozbunbar's attention had been directed. There was, in my view, no need to also inform him of the views expressed, so that he might comment upon them. The prospect that different opinions could be formed about the extent of his contact with his wife must have been obvious to him.

Orders

An extension of time for the bringing of the application is granted. The decision made on 14 April 1992 is set aside and remitted to the respondent for determination according to law. The respondent ought pay the applicant's costs of the proceedings.

I certify that this and the preceding seven (7) pages are a true copy of the Reasons for Judgment herein of the Honourable Justice Kiefel

Associate:

Dated: 28 August 1998

Counsel for the Applicant: Mr D Rangiah

Solicitor for the Applicant: Walsh Halligan Douglas

Counsel for the Respondent: Ms C Holmes

Solicitor for the Respondent: Australian Government Solicitor

Date of Hearing: 3 June 1998

Date of Judgment: 28 August 1998